Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1568

DISTRICT OF COLUMBIA,
Petitioner,

v.

RICHARD A. BISHOP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

RESPONDENT BISHOP'S BRIEF IN OPPOSITION

JOHN M. BIXLER
RONALD D. AUCUTT
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: 393-5660

Attorneys for Respondent

Of Counsel:

MILLER & CHEVALIER
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Subject Index

	Page
Jurisdiction	1
Question Presented	2
Reasons for Denying the Writ	3
1. The Fiscal Significance of This Case Is Purely Local and Therefore Fails to Justify Review by This Court	3
2. The Decision Below Was Required by the Self-Government Act. That Decision Neither Restricts the Grant of Self-Government Nor Imposes on Congress Duties Congress Sought to Delegate	6
3. The Self-Government Act Was Correctly Construed Below	8
Conclusion	12

Cases Cited

Alaska v. *Arctic Maid*, 366 U.S. 199 (1961)	6
American Security & Trust Co. v. *Commissioners of the District of Columbia*, 224 U.S. 491 (1912)	2, 5
Busby v. *Electric Utilities Employees Union*, 323 U.S. 72 (1944)	5
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821)	2
Complete Auto Transit, Inc. v. *Brady*, 435 U.S. 274 (1977)	9-10
Dawson v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921)	9
Del Vecchio v. *Bowers*, 296 U.S. 280 (1935)	5
District of Columbia v. *John R. Thompson Co.*, 346 U.S. 100 (1953)	5

CASES (Continued)

	Page
District of Columbia v. *Murphy*, 314 U.S. 441 (1941) ..	5
District of Columbia v. *Pace*, 320 U.S. 698 (1944)	5
General Motors Corp. v. *District of Columbia*, 380 U.S. 553 (1965)	5, 9
Key v. *Doyle*, 434 U.S. 59 (1977)	2, 6
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959)	9
O'Donoghue v. *United States*, 289 U.S. 516 (1933)	2
Palmore v. *United States*, 411 U.S. 389 (1973)	6
Pernell v. *Southall Realty*, 416 U.S. 363 (1974)	5
Territory of Alaska v. *American Can Co.*, 358 U.S. 224 (1959)	6
Universal Interpretive Shuttle Corp. v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968)	5
United Surety Co. v. *American Fruit Product Co.*, 238 U.S. 140 (1915)	2, 5

UNITED STATES CODE CITED

28 U.S.C. § 1257(3)	1

DISTRICT OF COLUMBIA CODE CITED

D. C. Code § 1-147(a)(5) (Supp. V, 1978)	8, 11
D. C. Code § 47-1574(b) (Supp. V, 1978)	8-9

ACTS OF CONGRESS CITED

District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473	5, 6

CONGRESSIONAL MATERIALS CITED

House Comm. on the District of Columbia, Home Rule For the District of Columbia 1973-1974, Background and Legislative History of H. R. 9056, H. R. 9682, and Related Bills, 93d Cong., 2d Sess. 1126 (1974)	11
117 CONG. REC. 42498 (1971)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1568

DISTRICT OF COLUMBIA,
Petitioner,

v.

RICHARD A. BISHOP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

RESPONDENT BISHOP'S BRIEF IN OPPOSITION

Respondent, Richard A. Bishop, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the District of Columbia Court of Appeals in this case—a case in which the full court, by a vote of nine to one after rehearing the case en banc, upheld the unanimous decision of the three judge division of the court which first ruled for the respondent.

JURISDICTION

The petitioner cites 28 U.S.C. § 1257(3) and relies upon a lengthy textual footnote (p. 5, n. 2) to support its invocation of this Court's certiorari jurisdiction.

Its jurisdictional assertion presupposes the applicability of a law "of the United States," as does the jurisdictional footnote in which it contends that the District of Columbia Self-Government and Governmental Reorganization Act (Self-Government Act) is such a law. This Court, however, has specifically held "that a law applicable only in the District of Columbia is not a 'statute of the United States' . . . ." *Key* v. *Doyle,* 434 U.S. 59, 61 (1977). *Accord, United Surety Co.* v. *American Fruit Product Co.,* 238 U.S. 140 (1915); *American Security & Trust Co.* v. *Commissioners of the District of Columbia,* 224 U.S. 491 (1912).

The two cases cited by the petitioner do not alter the distinction which this Court has made between laws of local application and laws of genuine national scope. As its name suggests, *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821), involved a conflict between an Act of Congress and the laws of a state, a situation which is not present here. *Id.* at 359-65. And *O'Donoghue* v. *United States,* 289 U.S. 516 (1933), simply did not involve the character of any statute, but rather the constitutional status of certain courts. The respondent, accordingly, submits that the petition should be dismissed for want of jurisdiction. However, recognizing the broad discretion of this Court in reviewing petitions for writs of certiorari, the respondent submits that the petition should, in any event, be denied for the reasons stated below.

QUESTION PRESENTED

Assuming jurisdiction, the question presented is not one of "broadly delegated . . . constitutional power," as the petitioner asserts (p. 2), but whether the petitioner's imposition of its unincorporated business tax on the respondent's income from the performance of personal services violates the specific prohibition, deliberately enacted by Congress in the Self-Government Act (Petitioner's App. at 55a), that—

> [t]he Council shall have no authority to . . . impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

REASONS FOR DENYING THE WRIT

The petitioner advances three basic reasons this Court should grant its request for a writ of certiorari—(1) that the case has major fiscal significance (p. 6, n. 3), (2) that the decision below severely restricts the congressional grant of self-government to the District, imposing on Congress duties Congress sought to delegate (p. 7), and (3) that the decision below violates principles of statutory construction by misconstruing the Self-Government Act (p. 10).

The petitioner's reasons fail to support its petition for review. Indeed, an examination of those reasons, by focusing upon the very thorough review that this case has already received, confirms that the writ of certiorari should be denied.

1. The Fiscal Significance of This Case Is Purely Local and Therefore Fails to Justify Review by This Court.

The respondent does not dispute the fiscal significance of this case, particularly to the taxpayers involved, or the financial loss to the District of Columbia government if it is required to refund the taxes which

the District's highest court, after two hearings, has held to have been illegally collected. The respondent simply points out the obvious—that in the petitioner's own words (p. 6, n. 3) this case involves a "revenue loss to the District" and not a federal issue of national importance.

From the fact that the courts of Maryland and Virginia have had occasion to consider the same District of Columbia tax that is in issue here, the petitioner (p. 9) vainly seeks to create "interjurisdictional importance." As the petitioner admits, the inquiry of those state courts has been whether to grant taxpayers a credit under the laws of those states for the unincorporated business tax paid to the District. Since the District of Columbia Court of Appeals has now held that the respondent cannot be made to pay the tax in the first instance, his possible right to a credit can no longer have any "importance" for Maryland and Virginia. Moreover, the interjurisdictional importance of this case can hardly be created by the refusal of the District's highest court (1) to validate a law that would result in double taxation of the income of nonresidents performing personal services in the District, and (2) to approve a new statutory scheme which would place a disproportionately large share of the burden of a new tax upon nonresidents by allowing District residents subject to the new tax to exclude their income subject to the new tax from their income subject to the District's individual income tax. Thus, the respondent submits that (1) the case was correctly decided by the highest local court in a manner which *avoids* interjurisdictional conflict and (2) in its present posture the case presents no substantial federal question.

Every example of this Court's review of District of Columbia cases cited by the petitioner (p. 6) is readily distinguishable. Those cases all arose before enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, and involved the vindication and clarification of strong federal interests—in racial equality, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953); in the authority of the Secretary of the Interior, *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968); and in the prevention of "triple taxation" of federal employees, *District of Columbia* v. *Murphy*, 314 U.S. 441, 452 (1941), and *District of Columbia* v. *Pace*, 320 U.S. 698 (1944). Moreover, contrary to the inference drawn by the petitioner, "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern . . . ." *Pernell* v. *Southall Realty*, 416 U.S. 363, 366 (1974).

Even before the 1970 Court Reform Act, the Court said: "We are normally content to leave undisturbed decisions by the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District." *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556 (1965). *Accord, Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72, 75 (1944) (per curiam); *District of Columbia* v. *Pace, supra* at 702; *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935); *United Surety Co.* v. *American Fruit Product Co., supra; American Security & Trust Co.* v. *Commissioners of the District of Columbia, supra.* It is true that such pronouncements appear as dicta (in cases characterized by an overriding federal

issue, unlike the case here), but that is the only way a policy *not* to review cases *can* be expressed. In addition, this Court's reluctance to review such local cases is reinforced by the 1970 Court Reform Act, which was intended "to establish an entirely new court system . . . with responsibility for trying and deciding those distinctively local controversies that arise under local law . . . ." *Key* v. *Doyle, supra* at 67; *Palmore* v. *United States,* 411 U.S. 389, 409 (1973).

The present case is a "distinctively local controversy." The petitioner (p. 8) cites two cases in which this Court has reviewed decisions of lower *federal* courts that limited the application of certain Alaskan taxes. *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961); *Territory of Alaska* v. *American Can Co.,* 358 U.S. 224 (1959). But in the present case a District tax on income earned in the District has been held invalid by the highest court of the District, and by a solid 9-to-1 vote of the judges sitting en banc. To the extent that the petitioner feels restricted in its ability to raise revenue, the respondent submits that it must plead its cause to Congress, not to this Court. There is no purpose, and certainly not the purpose of "self-government" which the petitioner cites, to be served by this Court's review of such an unequivocal local resolution of a local matter.

2. The Decision Below Was Required by the Self-Government Act. That Decision Neither Restricts the Grant of Self-Government Nor Imposes on Congress Duties Congress Sought to Delegate.

The petitioner complains (p. 7) that "[t]he decision of the Court of Appeals results in a serious depreviation [sic] of self-government and a reimposition on

Congress of legislative functions that Congress delegated to the District." This theme, repeated throughout the petition, begs the question. It is simply an assertion that the lower court's decision should be reviewed because the petitioner disagrees with it, hardly a ground for issuing a writ of certiorari.

The petitioner has never contended that in the Self-Government Act Congress delegated to the District Council *all* taxing power, or that Congress failed to reserve *any* taxing power. In the Appendix to its petition (p. 55a), the petitioner sets forth the clear declaration by Congress that—

> [t]he Council shall have no authority to . . . impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . . .

The highest court of the District found the tax in question by its plain language and its legislative history to be just such a tax. As a result, that court properly invalidated the tax. The court did no disservice to Congress by "return[ing] to it the burden of legislating on matters logically within the grant of self-government . . ." (p. 7), because Congress itself expressly and deliberately retained that "burden."

The petitioner makes the same mistake by stating (p. 6, n. 3) that "[t]he decision also places a cloud over the District's authority to impose in the years ahead any tax, measured by net income, on this class of taxpayers under the Self-Government Act." This is true, but because Congress itself limited the District's authority to impose "any tax" on the personal income of nonresidents, which unquestionably embraces "this class of taxpayers," including the respondent. Similarly,

in seeking to establish the importance of this case, the petitioner complains (p. 7, n. 4) that "the tax base of the District is extremely narrow," citing the same congressional prohibition.

In short, the petitioner advances the proposition that the very existence of the congressional prohibition is cause enough for its scope to be reviewed by this Court. This argument fails to justify issuance of a writ of certiorari.

3. The Self-Government Act Was Correctly Construed Below.

The petitioner asserts (p. 9) that the District of Columbia Court of Appeals "contravened [the] plain meaning [of the Self-Government Act] and violated settled principles of statutory construction long recognized by this Court," and charges (p. 10) that the court "ignored critical words" of the Self-Government Act. The petitioner then proceeds to misquote that Act by omitting the critical word "any" in the congressional prohibition of "*any* tax on the whole or *any* portion of the personal income . . . of *any* individual not a resident of the District . . . ." D. C. Code § 1-147 (a)(5) (Supp. V, 1978) (emphasis added). *Compare* Petition at 10 *with* App. at 55a. In fact, the court below violated no principle of construction by recognizing that this language is very broad.

The petitioner, however, insists (p. 10) that this broad prohibition "plainly does not prevent the District from imposing a *franchise tax* on unincorporated *business entities* for the privilege of doing business in the District." But the test of the prohibition is not what the tax is called, or what it is "for," but what it is "on." And the unincorporated business tax in question here is "levied . . . upon . . . income." D.C. Code

§ 47-1574b (Supp. V, 1978). The court below violated no principle of construction by recognizing that the prohibition of "any" such tax prohibits imposition of the tax in question here. Thus, it is the petitioner which has ignored "settled principles of statutory construction" by its respect for form over substance and its preoccupation with the label that was given the unincorporated business tax when it was first enacted in 1947. The controlling principle is that "[t]he name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents . . . ." *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292 (1921). This is the test which was applied by the court below. *See* Petitioner's App. at 27a-32a.

Consistent with this principle, in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458-62 (1959), this Court reviewed a number of precedents involving "income," "franchise," and "privilege" taxes—all based on net income. Disregarding labels, this Court stated that all of the precedents "involv[ed] income levies by States." *Id.* at 461. Similarly, in *General Motors Corp.* v. *District of Columbia*, *supra* at 559-61, this Court freely likened the District's corporate "franchise" tax (part of the same 1947 tax statute which the petitioner claims gave the unincorporated business "franchise" tax its character) to "corporate income taxes," "state taxes imposed on income," and a "state income tax," and finally, in *Complete Auto Transit, Inc.* v. *Brady*, 435 U.S. 274 (1977), this Court stated:

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that

> formalism merely obscures the question *whether the tax produces a forbidden effect. Id.* at 288 (emphasis added).

That was the precise question raised and answered by the court below. *See* Petitioner's App. at 29a-32a.

Again, the petitioner (p. 12) cites "over 30 years of congressionally established taxing distinctions" and complains that the court below "sets forth no congressional pronouncement which spells out an intent to reconstitute the franchise tax as a tax on personal income . . . ." The reason for this, of course, is that the petitioner has never set forth any congressional pronouncement which spells out an intent that the franchise tax *not* be treated as a tax on personal income from the beginning, contrary to the impression that the petitioner may have created by its misleading and unjustified insertion of the word "personal" into its paraphrase of the 1947 legislation in its statement of the case. *Compare* Petition at 3 *with* App. at 56a. The petitioner relies only on the label of the tax. The court below correctly recognized that a tax labelled a franchise tax can in substance be considered any number of types of tax (including a tax on personal income), "depending on the incidents of taxation" (Petitioner's App. at 27a), and analyzed this case accordingly. Moreover, when Congress enacted this "franchise tax," it expressly excluded personal service income from the tax base. *See* Petitioner's App. at 56a.

Finally, the petitioner (p. 13) asserts that the congressional prohibition "was aimed at the 'commuter' and 'reciprocal' income tax proposals made by the District prior to enactment of the Self-Government Act." It states that Senator Eagleton, the principal

Senate sponsor of the Self-Government Act, distinguished "between an across-the-board tax on the personal income of nonresidents and the business franchise taxation involved here . . . ." That distinction is obvious (although not from Senator Eagleton's cited remarks), but the fact remains that the respondent's personal service income would have been taxed under the proposed "commuter" and "reciprocal" income taxes, just as it has been taxed by reason of the petitioner's illegal action here.

The court below correctly recognized that the petitioner's attempt to tax the respondent's income is no less repugnant to the congressional prohibition merely because *some* nonresidents are selected as the target. This holding was compelled by the Self-Government Act, which prohibits, not only an "across-the-board" tax on *all* income of *all* nonresidents, but "*any* tax on the whole or *any* portion of the personal income . . . of *any*" nonresident. D. C. Code § 1-147(a)(5) (Supp. V, 1978), Petitioner's App. at 55a (emphasis added). Senator Eagleton himself described this provision as "a specific prohibition as to the imposition of a commuter tax, a reciprocal income tax, *or any other tax* on nonresidents of the District of Columbia." 117 CONG. REC. 42498 (1971) (emphasis added). Similarly, Representative Gude, the House sponsor of the prohibition, confirmed that it would preclude "any tax which is based on a percentage of income regardless of whether it is technically considered personal income." House Comm. on the District of Columbia, Home Rule for the District of Columbia 1973-1974, Background and Legislative History of H. R. 9056, H. R. 9682, and Related Bills, 93d Cong., 2d Sess. 1126 (1974). These specific statements in the legislative history relating to the

express statutory language in question were all considered by the court below. Petitioner's App. at 3a-4a. That court's thorough work requires no further review here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN M. BIXLER
RONALD D. AUCUTT
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: 393-5660

Attorneys for Respondent

Of Counsel:

MILLER & CHEVALIER
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006